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VICKI CAPRIO and DUANE A. BARBAROTTO  
as decedent Nicholas Barbarotto's Successors in Interest

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT COURT OF CALIFORNIA**

VICKI CAPRIO and DUANE A.  
BARBAROTTO as decedent Nicholas  
Barbarotto's Successors in Interest,

Plaintiffs,

vs.

HARTFORD LIFE INSURANCE  
COMPANY a corporation doing business as  
THE HARTFORD and HARTFORD LIFE  
AND ACCIDENT INSURANCE COMPANY  
and Does 1 through 20, inclusive,

Respondents.

Case No.: C08-0338 CW

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION TO DISMISS  
COMPLAINT**

Judge: Claudia Wilken  
Date: April 8, 2008  
Time: 2:00 p.m.  
Ct rm: 2, 4<sup>th</sup> Floor

**INTRODUCTION**

The prior action upon which Defendant bases its claim of res judicata was filed after the death of the plaintiff Nicholas Barbarotto. Judgment entered against a party who died before the

1 action is commenced is void- a judicial nullity. A void judgment cannot be the basis for the  
2 application of the claim preclusion doctrine in a res judicata analysis.

### 3 STATEMENT OF FACTS

4 On February 22, 2006, counsel filed an action against Hartford Life Insurance Company  
5 (Hartford) on behalf of Nicholas J. Barbarotto (Barbarotto), individually and as a trustee for the  
6 Nicholas J. Barbarotto Revocable Living Trust Agreement dated November 2, 2005.(See  
7 Defendant's Request for Judicial Notice, Exhibit 1.) Said complaint contained allegations that  
8 Hartford had issued two separate accidental death policies covering Barbarotto and his wife  
9 Tamara Barbarotto. (*Id.* at pp. 6-7) Barbarotto alleged in his complaint that Tamara died on  
10 October 19, 2002 as result of injuries sustained in an accident which occurred on July 2,  
11 2002.(*Id.* at pp.9-10) Barbarotto further alleged that Hartford wrongfully denied his timely filed  
12 claims for the total death indemnity under both policies.(*Id.*at pp.11-12) The complaint contained  
13 causes of action for breach of contract and breach of good faith and fair dealing.

14 Following Hartford's appearance in the prior action, it was discovered that Barbarotto had  
15 died on February 14, 2006, before that action was filed.(Docket #1,Exhibit A p.1) Further it was  
16 determined that Barbarotto's claims against Hartford had never been added to the corpus of the  
17 Nicholas J. Barbarotto Revocable Living Trust. The prior action could not be amended pursuant  
18 to Federal Rules of Civil Procedure Rule 25 to substitute Vicky Caprio and Duane Barbarotto as  
19 Decedent Barbarotto's successor in interest because the action was now a nullity and could not  
20 be amended. Counsel for Plaintiff in that prior action entered into a stipulation with Hartford to  
21 dismiss the action with prejudice.(See Defendant's Request for Judicial Notice, Exhibit 2)

22 Vicky Caprio and Duane Barbarotto as Decedent Barbarotto's successor in interest  
23 brought the present action in state court on essentially the same claims against Hartford as the  
24 prior action. .(Docket #1,Exhibit A) Hartford removed the present action to this court on January  
25 17, 2008.(Docket #1)

### 26 Argument

27 **A The Prior Action Was A Nullity And Can't Act As A Bar To Subsequent Action**

Hartford has brought the present Rule 12(b) motion on the grounds that the doctrine of res judicata bars the present action. Such motion must be based on defects found on the face of the complaint or matters on which the Court may take judicial notice. The Court must accept allegations in the complaint as true. *Pareto v F.D.I.C.* 138 F.3d 696,699 (9<sup>th</sup> Cir. 1998) Therefore, for purposes of the present motion, the Court must accept as fact that Barbarotto died before the prior action was filed.

As Hartford states in it's motion, a final judgment on the merits in the prior action is a necessary element to establish res judicata. However, only a valid judgment can be used to establish res judicata. *Moore's Federal Practice Guide 3d §131.30[1] [a]* An action in which the plaintiff dies before the complaint is filed is a judicial nullity. *Banakus v. United Aircraft Corp.* 290 F. Supp. 259 (1968) The District Court there found that, since the action was void from it's inception, there were no claims capable of amendment to permit the substitution of the decedent's successors in interest pursuant to Rule 25.

The District Court in *Banakus* pointed out under Rule 17 (b) the capacity of an individual to sue is to be determined by the law of his domicile and found that the law of the deceased's domicile didn't permit actions brought on behalf of the decedent. *Id. at 260* It was alleged in the prior complaint that Barbarotto was a resident of California. (See Defendant's Request for Judicial Notice, Exhibit 1. p.1) Under California law, a judgment against a party who died before the action was commenced is void as lacking jurisdiction and not binding on his heirs. *Colin v. Blanchard* (1933) 219 Cal 632

While Federal Rules of Civil Procedure Rule 25 provides the procedure in the event of the death of a party, the effect of the death of a party is determined by the applicable substantive law. *California Practice Guide; Federal Civil Procedure Before Trial; Parties §7:356* The law in California and elsewhere is clear that the death of a party before commencement of the action renders any judgment against him void and the action itself a judicial nullity 46 *American Jurisprudence 2d; Judgments §90* Given that the prior action was commenced after the death of Barbarotto, no order of dismissal of that action can act as a bar to the present action.

**B Counsel had no Authority to Bind Successors in Interest**

1 Claim preclusion will not apply to persons absent from the prior action unless the parties  
2 present have some authority by contract or operation of law to represent them. *Dudley v. Myers*  
3 *570 F 2d. 1065, 1071 (1<sup>st</sup> Circuit 1978)* Defendant cannot show, that at the time the prior  
4 action was dismissed, Plaintiff's counsel had been retained by an executor of Barbarotto's  
5 estate or Vicky Caprio and Duane Barbarotto as Decedent Barbarotto's successor in interest.  
6 Counsel had no authority to represent them in the prior action absent an agreement or operation  
7 of law and the dismissal should be no bar to the present action.

8 **Conclusion**

9 A prior action which was void from its inception or a judicial nullity cannot act as a bar to  
10 a subsequent action.

11  
12 Dated: March 13, 2008

13 DYKMAN & WESTER, LLP

14  
15 By \_\_\_\_\_/S/\_\_\_\_\_  
16 MATTHEW D. BREKHUS  
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